

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1507

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- -x
UNITED STATES OF AMERICA,
Appellee,
-against-
JAMES C. THWEATT,
Appellant.
----- -x

To be argued by
RICHARD A. GREENBERG

Docket No. 77-1507

REPLY BRIEF FOR APPELLANT

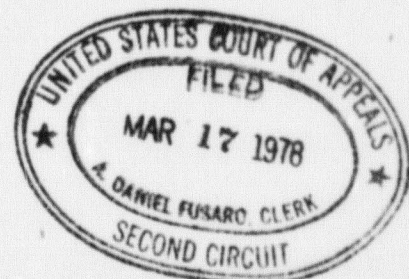
ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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P/S

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POINT I

THE COURT'S SUPPLEMENTAL INSTRUCTIONS CREATED REVERSIBLE ERROR (answering POINT I, pp.16-24, of the government's brief)

The government places great reliance on the fact that the court on several occasions issued "an invitation" to the jury to request additional instructions if the jury's requests during deliberations had not already been answered by the court. The government appears to argue from this fact that the court showed itself to be responsive to the jury's questions.

The problem with this argument is that the character evidence charge urged by appellant was no less responsive to the jury's request for "any part of the charge relating to the jury's responsibility in considering the defendant's intent" than were the supplemental charges on false exculpatory statements, consciousness of guilt, and "similar acts" evidence which the court did give the jury without "inviting" them to return with another specific request for instructions on those matters.

While we agree with the government that character evidence is "pertinent" to the issue of reasonable doubt (govt.br.21), it is also pertinent to the question of intent, at least under the circumstances of this case, not only because defense counsel so linked them in his argument to the jury but because, as Wigmore recognizes, "so far as in criminal cases the criminal intent remains in issue [which it did here], the good character of the defendant may be regarded as always relevant to disprove it." I Wigmore, EVIDENCE (3d ed.), §56, pp.453-454.

Nor is the government correct when it asserts that the supplemental instructions the court did give were not objected to by defense counsel when the court initially gave them in its principal charge (govt.br.18). For example, the court's supplemental charge on false exculpatory statements and consciousness of guilt (2409-2410) was in fact objected to by defense counsel when the court initially proposed to charge in that manner (2196). In any event, appellant is not disputing the propriety of the charge as initially given, but rather the "biasing of the record" [United States v. Gentile, 525 F.2d 252, 261 (2d Cir., cert.den. 425 U.S.903 (1976))] resulting from repeating only these prosecution-oriented instructions during the jury's deliberations.

The government's attempt to label the court's supplemental instructions as "clearly favorable to the defendant" (govt.br. 19) can only be termed misguided. True it is that the court used the word "reasonable doubt" four times in its supplemental instructions (govt.br.18), but never did it define the concept again, even though, for example, it recharged completely on "circumstantial evidence" (2405-2407), a concept clearly favorable to the government.

Finally, the government offers the predictable argument that any error arising from the court's failure to re-charge on character evidence was harmless. The government's contention that evidence of guilt was "overwhelming" (govt.br.24) is belied by the fact that the jury did not convict appellant on half of the counts despite a full day and a half of deliberations. Moreover, the counts on which they did convict, only after lengthy deliberation, were concededly uncomplicated, amounting to essentially identical conduct repeated nineteen times over nineteen months.

In short, the nature and length of jury deliberations alone demonstrate that, at least in the jury's view, the evidence of guilt was anything but overwhelming.*

* The government asserts that the purportedly "overwhelming" evidence demonstrated "diversion of thousands of dollars to Thweatt" (govt.br.24). It must be remembered that on the charges of "diversion" contained in Counts 37 and 38, the jury did not reach agreement and therefore the allegations concerning diversion remain just that -- allegations. In any event, this characterization by the government is grossly misleading. Although the government traced \$22,275 from 121 Management Corp.'s various accounts into appellant's personal accounts, of which it contends that approximately \$8000 was federally reimbursed rent money (govt.br.12), the government fails to mention that at least \$17,600 was withdrawn by appellant from his personal accounts and deposited back in SWI's accounts (1755). Moreover, of an approximate total of \$325,000 deposited in SWI accounts from all sources, only \$79,000 was traceable as federal money (1725-1930). The balance of approximately \$245,000 was derived from non-federal sources, a large part of which was private corporate contributions which appellant was instrumental in securing. The government's entire theory of appellant's enrichment by means of federal funds was bottomed on appellant's co-mingling of both federal and non-federal funds (2137-2182), without affirmative proof that the funds deposited in appellant's accounts or which paid for various expenditures the government claimed were improper were actually federally derived.

POINT II

THE COURT ACTED IMPERMISSIBLY WHEN IT INCREASED APPELLANT'S SENTENCE BECAUSE HE FAILED TO DEMONSTRATE CONTRITION (answering POINT III, pp. 28-31, of the government's brief)

In its brief, the government appears to concede much of appellant's argument in his principal brief concerning the propriety of his sentence. For example, the government does not contest appellant's assertion that when a defendant appears for sentencing following his conviction after trial he retains a Fifth Amendment right not to incriminate himself. Nor does the government dispute appellant's assertion that the court here increased his sentence at least in part because he failed to show "contrition" through an acknowledgment of guilt. Nor does the government challenge the correctness of the decisions upon which appellant principally relies for the proposition that a court may not place the "price tag" of a higher sentence upon a defendant's refusal to show contrition by admitting guilt at sentencing, at least while appellate review is available. Po-teet v. Fauver, 517 F.2d 393(3d Cir.1975); Scott v. United States, 419 F.2d 264(D.C.Cir.1969); Thomas v. United States, 368 F.2d 941(5th Cir.1966); see also, United States v. Ramos, ___ F;2d ___, Slip op.1575(2d Cir.February 15, 1978), rehearing en banc den., slip op.1571; United States v. Garcia, 544 F.2d 681 (3d Cir.1976).*

* Neither Ramos, decided after appellant's principal brief was filed, nor Garcia were mentioned in either the government's or appellant's briefs. Both cases cast doubt on the ability of a court to increase the severity of a sentence of a defendant who has pleaded guilty where the defendant refuses to cooperate with the (continued to page 5)

Having implicitly conceded as much as it has, the government is reduced to advancing the specious argument that, while the court may not have been permitted to increase appellant's sentence for failure to show contrition if appellant had stood "mute or simply den[ied] his guilt" [govt.br.30,fn.], the court was nonetheless permitted to do so here because appellant ventured to make general exculpatory statements both in a letter to the court* and at sentencing, from which the government deduces that he "never exercised his Fifth Amendment rights" [govt.br. 28].

The government's argument reduces to the following proposition: a defendant must stand virtually mute at his sentencing,

(Continued from page 4)
government by providing information concerning the criminal activity of others. Garcia did so expressly on a Fifth Amendment analysis. To the extent that appellant's principal brief (p.35 and fn) can be read as conceding that United States v. Vermeulen, 436 F.2d (2d Cir.), cert.den., 402 U.S.911(1971), permits a court to increase the sentence of a defendant who refuses to co-operate, such concession is withdrawn. For as Judge Lumbard, in his concurring opinion, in Ramos, wrote: "Nowhere have we suggested that the defendant's refusal to co-operate may be considered in increasing the sentence he would otherwise receive." Supra, slip.op. at 1582, fn.2. If a sentence may not be increased when a defendant refuses to provide the real benefit to society of "assist[ing] the sovereign in improving social order and the public welfare" by co-operating with the government concerning criminal activity of others [United States v. Garcia, supra, 544 F.2d at 682], there is even less justification for increasing a sentence where a defendant fails to proclaim a mea culpa of dubious benefit to society.

* The prosecutor's undue emphasis on the letter appellant wrote to the court appears to be prompted more by indignation over appellant's claim in the letter that the government had coerced witnesses into refusing to co-operate with his defense than by any relevance the letter has to the merits of the issue at hand. The government's fulminations notwithstanding, the letter is essentially irrelevant to the question of whether the court could increase appellant's sentence because he failed to demonstrate contrition.

and thereby forego the opportunity of securing lenient treatment by advancing arguments in mitigation even on such traditional matters as his family, his health, or lack of prior record, in order to prevent the court from taking into consideration the failure to show contrition demonstrated by his silence; however, if a defendant chooses to speak at all, he must show contrition (i.e., acknowledge guilt) or run the risk of receiving a higher sentence for failing to have done so.

If the government's argument were to be accepted, not only would it trench on a defendant's right to allocution [Green v. United States, 365 U.S. 301 (1961)], but it would confront a defendant with a Hobson's choice similar to the ones that the courts have rejected. United States v. Garcia, supra, 544 F.2d at 685; Scott v. United States, supra, 419 F.2d at 268; Thomas v. United States, supra, 368 F.2d at 945. The government's argument should fall of its own weight.

Moreover, in making the argument, the government chooses to ignore the record. For, contrary to its assertion that appellant "at no time indicated that his inability to exhibit some contrition involved constitutional values" [govt.br.29], the Pre-Sentence Report, which presumably was before the court, reflects appellant's position that "[i]nasmuch as the defendant intends to appeal his conviction, he, upon the advice of counsel, has elected not to make any formal references to the material facts of his case." Thus, the court was put on notice that appellant not only intended to appeal, but by strong implication that his refusal to admit guilt did in fact involve "constitutional values."

Furthermore, the government makes the bald assertion, unsupported by citation to any authority, that "surely it is legitimate [for a sentencing court] to consider a defendant's lack of contrition when that defendant does not stand mute or simply deny his guilt" (govt.br.30,fn.). This of course is roughly the issue presented on this appeal, and its resolution is not advanced by the government's conclusory assertion.

There may well be situations in which sentencing courts may consider a defendant's lack of contrition in imposing sentence. These may include cases where a defendant pleads guilty or indicates he does not intend to appeal, for in such circumstances a defendant may no longer have any Fifth Amendment rights, at least as to the crime of which he was convicted. See, United States v. Sanchez, 459 F.2d 100,103(2d Cir.),cert.den. 409 U.S. 864(1972); United States v. Gernie, 252 F.2d 664,670(2d Cir.),cert.den., 356 U.S. 968(1958).

Moreover, it may well be permissible for a sentencing court to show leniency to a defendant who has voluntarily demonstrated contrition by giving him a lighter sentence. This distinction was recognized by Judge Lumbard in Ramos when he wrote concerning an analogous situation:

"It is one thing to extend leniency to a defendant who is willing to co-operate with the government; it is quite another thing to administer additional punishment to a defendant who by his silence, has committed no additional offense." Supra, slip op. at 1582,fn.2.

It is appellant's position, however, that at least where, as here, a defendant has stood trial and has indicated his intention to appeal the conviction, a court may not consider his lack of contrition to the extent of imposing a higher sentence because of it.

Finally, the government attempts to distinguish the primary cases on which appellant relies -- Poteet, Scott, Thomas (and now Garcia and Ramos) -- apparently on the basis that the courts there actively sought to induce the defendants to show contrition or acknowledge guilt before imposing sentence. This attempt is unavailing. For whatever else might be said of the sentencing courts' actions in those cases, at least the defendants there knew what they were facing by their continued refusal to admit guilt or show contrition, and thus persisted in adhering to their Fifth Amendment rights with "eyes open." Faretta v. California, 422 U.S.806,835(1975). Here, appellant was not made aware that the court was demanding or expecting a demonstration of contrition on pain of an increased sentence if appellant refused to do so. Thus, if anything, the present case is even stronger than the cases appellant has relied on and, in any event, the proposition established in the cited cases is equally applicable here: a court may not predicate an increased sentence on the failure of a defendant to show contrition.

POINT III

THE TRIAL COURT'S DENIAL OF COUNSEL'S
REQUEST FOR A ONE WEEK CONTINUANCE WAS
UNREASONABLE (answering POINT V, pp.37-40,
of the government's brief)

Appellant has no quarrel with the government's assertion that trial court decisions on motions for continuances are governed by a standard of reasonableness [govt.br.38]. In none of the cases the government has cited, however, was the denial of the continuance as patently unreasonable as was the court's ruling here. See, for example, United States v. Rastelli, 551 F.2d 902,905-906(2d Cir.),cert.den.,___U.S.___46 U.S.L.W.3216(Oct. 4,1977)(trial scheduled to begin more than a year after indictment and District Court in fact granted a continuance in response to this Court's request on a mandamus proceeding); United States v. Lewis, 565 F.2d 1248,1252-1253(2d Cir.1977)(a "simple" bank robbery case in which request for continuance was made by defendant and not his attorney, who said he was ready for trial); United States v. Carroll,510 F.2d 507,509-510(2d Cir.),cert.den.,426 U.S. 913(1976)(trial began six months after indictment, defendant had dilatorily changed counsel several times, court had up-coming multi-defendant trials immediately afterwards, and co-defendants incarcerated for six months awaiting trial); United States v. Hall,448 F.2d 114,116(2d Cir.),cert.den.,405 U.S.935(1972)(trial began five months after indictment, defendant changed attorneys several times, government witnesses were thought to be shortly unavailable, and the charge was simple assault); United States v. Ellenbogen,365 F.2d 982,985-86(2d Cir.),cert.den.,386 U.S.923 (1967)(new trial began more than six months after first conviction

was reversed, and defense counsel had benefit of first trial's transcript).

Here, of course, there existed none of the factors which led this Court to affirm the denial of the continuances in the cited cases on which the government relies. Indeed, the government itself believed that the September 26th date fixed by the Court was too precipitous, for in requesting a date for trial in early October, approximately the same time requested by defense counsel, the prosecutor informed the Court that "under the circumstances of this case, we think that date [October 3rd] is an early date, indeed, the government will be working literally night and day to be prepared...even with that date..."(Tr. of August 22, 1977 proceedings, p.10).

Moreover, it is simply unfair for the government to now characterize defense counsel's request for a continuance as "an eleventh hour request" (govt.br.38). As early as August 22nd, the Court was informed by another attorney representing appellant only for the purpose of the pre-trial conference that it would be "impossible" for Mr. Bernstein to prepare the case in time for the September 26th date (Tr. of August 22, 1977 proceedings, p.23). And when Mr. Bernstein appeared for the first time on September 15th, he told the Court that "I don't think I can adequately prepare in eleven days" (Tr. of September 15, 1977 proceedings, p.10).

The unseemly haste with which appellant was put to a month-long, complicated fraud trial was due almost entirely to the fact that appellant had the misfortune to have his case assigned to one of six Southern District judges participating in a "Pilot Program" which required trial to commence within two months of

arraignment (Tr. of August 22, 1977,p.26). The Court itself recognized that

if the case had been assigned to somebody other than one of the six pilot judges, perhaps nothing [would have happened] either for a few months. But you drew me. I can't help it. I wasn't there, and I have an obligation. (Ibid)

It is important to remember, however, that defense counsel's request for an additional week to prepare would still have permitted trial to begin within the rigid two month period of the Pilot Program.

Furthermore, the only reason the court gave for refusing to grant the additional week was the scheduling problems created by a Sentencing Institute during mid-October in West Virginia which the court felt obliged to attend and a civil trial (Nabisco v. MotorVessel Normaha) the court had set for October 20th (Tr. of August 22, 1977,pp.21-22,37). It is respectfully contended that the need for defense counsel to prepare for a case in which appellant was facing a lengthy prison sentence should have taken precedence over these other matters.

Finally, two other matters raised by the government merit brief response. First, the government appears to argue that since counsel was willing to proceed on September 26th on Counts 1-19 if the government dismissed the remaining counts, and since appellant was only convicted on Counts 1-19, appellant has no cause to complain about the denial of a continuance (govt.br.35,39). The short answer is that the government did not dismiss the remaining counts, and counsel was forced to prepare a defense against the entire indictment. Indeed, the government's failure to secure appellant's conviction on Counts 20-38, despite what it claims was overwhelming evidence, raises the distinct possibility

that the government might not have secured the conviction on Counts 1-19, if only defense counsel had been granted another week to prepare.

Secondly, even assuming no particularized prejudice could be shown in this case, a matter we do not concede, that does not mean that prejudice is lacking or even that its absence should be dispositive. For just as an affirmative demonstration of prejudice is not necessary to secure reversal when a trial has been too long delayed [Moore v. Arizona, 414 U.S. 25 (1973)], so, too, it should not be necessary when a trial takes place with unwarranted haste. This is particularly so where, as here, the indictment is "substantial" and the trial long and complicated.

CONCLUSION

FOR THE ABOVE-STATED REASONS, AND FOR THOSE SET FORTH IN APPELLANT'S PRINCIPAL BRIEF, THE CONVICTION SHOULD BE REVERSED AND COUNTS 1-19 DISMISSED OR A NEW TRIAL ORDERED; ALTERNATIVELY, THE CASE SHOULD BE REMANDED FOR RESENTENCING BEFORE A DIFFERENT JUDGE

Respectfully submitted,

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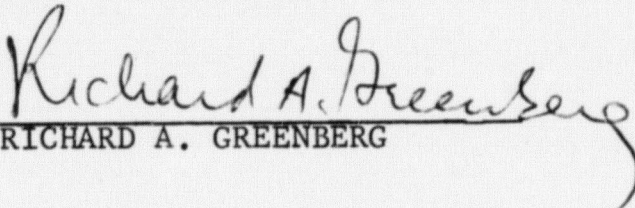
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March 17, 1978

CERTIFICATION OF SERVICE

Richard A. Greenberg, Esq., an attorney admitted to the bar of this Court, hereby certifies that he served the within Reply Brief for Appellant upon the United States Attorney for the Southern District of New York by personally delivering true copies of same to his offices at 1 St. Andrew's Plaza, New York, New York, on March 17, 1978


RICHARD A. GREENBERG

Rec'd 3/17/78

Sam J. Day Area